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No. 96-588

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

THE WASHINGTON TIMES CORPORATION,
Petitioner,

v.

JULIE BERMAN
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

Respondent Julie Berman, the prevailing plaintiff below, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the unpublished per curiam decision of the United States Court of Appeals for the District of Columbia Circuit.

As the unanimous panel disposition by the Court of Appeals makes plain, this case involves nothing more than a straightforward application of settled law to the particular facts at issue. Ms. Berman, formerly a senior graphics designer for The Times, alleged that she had

been discriminated against on the basis of her gender, largely but not exclusively by a supervisory employee, Donald Garlock, who had repeatedly stated to other employees that "he believed that the woman's place was at home raising children." [1]

Shortly after Mr. Garlock arrived in Ms. Berman's department, corporate promotions, in November of 1990, he reduced Ms. Berman to tears—boasting of the fact to Ms. Berman's co-workers, and then posting a sign saying "crybabies will be shot on sight." [2] Mr. Garlock suspended Ms. Berman without warning and without cause. Mr. Garlock took away hundreds of Ms. Berman's creative job assignments—Ms. Berman was the "Senior Designer" when Mr. Garlock arrived—and gave them to his male subordinates. Ms. Berman was reduced to cut-and-paste work, photocopying, and cleaning supplies. For each of

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[1] Stacey Chodash, a former female subordinate of Mr. Garlock, was one of those who testified to a number of similar comments. Ms. Chodash eventually resigned from The Times due to Mr. Garlock's gender-based abuse of her (and told human resources the reason). By happenstance, Ms. Chodash later met Regan Davis, another female former subordinate of Mr. Garlock, who testified at trial that Ms. Chodash's experiences "were so similar to mine, it was just uncanny." In the fall of 1990, immediately before Mr. Garlock was assigned to supervise Ms. Berman and other women in the corporate promotions department, Ms. Davis had a discussion with Roger Ott, Mr. Garlock's superior. According to Ms. Davis' testimony, Mr. Ott told Ms. Davis that "he was aware of the situation with Don [Garlock] but he said not to worry, that there weren't going to have any other women work under him." "[H]e said that he was aware of the situation and that no other women were going to work under Don" Garlock.

[2] Mr. Garlock told a co-worker of Ms. Berman that in an earlier supervisory position at The Times, "there was an occasion where he had made a female employee cry. He said that he made her cry and he smiled when he said this and he said, I hate crybabies." In January 1991, Mr. Garlock discussed Ms. Berman with this co-worker, saying "I had a little talk with her and I think she understands me now. I made her shake and I made her cry and I think that she understands me now."

these elements, the jury was presented with substantial evidence that male employees were treated differently.

Ms. Berman complained of Mr. Garlock's discrimination four times to human resources, and on other occasions to Mr. Garlock's supervisor, Peter Pitts. Ms. Berman finally filed a charge of discrimination with the U.S. Equal Employment Opportunity Commission. Other female subordinates of Mr. Garlock also complained to Mr. Pitts and to The Times' human resources director. The Times took no action: Tracy Hoff, director of The Times' human resources department, asked Ms. Berman only if Mr. Pitts could "control" Mr. Garlock, which she knew he could not.[3] No trace of any of these complaints—much less of earlier documents prepared by human resources indicating that Mr. Garlock's abuse had forced another female employee to resign—were to be found in Mr. Garlock's personnel file, and no discipline was ever imposed against Mr. Garlock.

After more than a year of this abuse, Ms. Berman was called in to meet with Ms. Hoff and Mr. Pitts. After Mr. Pitts confirmed to Ms. Berman, "It doesn't matter. It's your word against ours," Ms. Berman quit. The properly-instructed jury found that Ms. Berman's working conditions were made intolerable by this conduct, and that she was forced to resign.

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[3] While Ms. Hoff repeatedly asked Ms. Berman whether Peter Pitts could "control" Garlock, it was clear Mr. Pitts was not the one to do so. Mr. Pitts called another female employee a "cu*t" (and, at trial, lied under oath about it—according to witnesses offered by The Times). Mr. Pitts told Ms. Hoff herself to "f**k off." After the latter incident, Ms. Hoff sent a memorandum to Mr. Pitts noting his "vulgar," "condescending and patronizing" conduct, and warning that "[i]t would be difficult for me to support your decision on a disciplinary matter when one of your employees complains that you are too . . . shall we say 'brash.'" Of course, Ms. Hoff did testify in support of Mr. Pitts' decisions, after executing an agreement in which she promised to testify for The Times in exchange for a substantial cash payment.

The case was tried over a four-week period, with several interruptions, by Senior Judge William B. Bryant, a highly experienced trial judge. The jury deliberated over a period of days and returned a mixed verdict: finding for The Times on Ms. Berman's claim of hostile environment sexual harassment, but in favor of Ms. Berman on her claims of gender-based discrimination, constructive discharge, and retaliation. The jury assessed modest compensatory damages of $47,185, and a more substantial punitive damages verdict in excess of $700,000.[4] The Times noted an appeal to the Court of Appeals for the District of Columbia Circuit, which affirmed in a unanimous, unpublished, per curiam determination.[5] The Times' petition for rehearing and suggestion for rehearing en banc were denied.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS APPLIED SETTLED LAW IN AFFIRMING THE DETERMINATION OF THE TRIAL JUDGE THAT PLAINTIFF'S CLOSING ARGUMENT WAS NO WARRANT FOR A NEW TRIAL

The Court of Appeals, noting that "the district judge carefully instructed the jury that statements of counsel

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[4] The amount of the punitive damages verdict is the only factor which removes this case from the ordinary run of discrimination claims. The Times' petition for certiorari, however, does not challenge the amount of the punitive damages award.

[5] The Court of Appeals, noting that during the pendency of the appeal this Court had decided *BMW of North America, Inc. v. Gore*, 116 S.Ct. 1589, 64 U.S.L.W. 4335 (1996), ordered a limited remand. The Court of Appeals noted the "three guideposts" set out by this Court in *Gore*; held that the appellate court was "as well situated as the district court to perform the comparisons called for by the second and third of these guideposts," and remanded the punitive damages award for a determination of the first factor, "namely, the reprehensibility of the defendant's conduct." App. at 13-14. The Times does not petiiton for certiorari to review this aspect of the decision of the Court of Appeals.

are not evidence, and . . . admonished the jurors to make their decision based upon the evidence and not upon their passions or sympathies," found nothing—"after consideration of the record as a whole"—to suggest that the trial judge abused his discretion in denying The Times' motion for a new trial. App. at 10. In so holding, the Court of Appeals was plainly correct.[6]

Essentially all of the isolated selections of closing argument of which The Times complains related to missing documents: documents respecting which there was testimony during trial but which were not introduced into evidence by The Times. Among the missing documents to which Ms. Berman's counsel referred in closing were (i) the notes of an "exit interview" given to The Times' human resources department, in which a female subordinate of Ms. Berman's abusive supervisor placed The Times on notice of the supervisor's inability to work with women;[7] (ii) notes taken by Tracy Hoff, The Times' di-

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[6] Despite The Times' attempt to inflate its argument into a conflict between the Circuits, nothing the Court of Appeals did in this case applied any different standard than the one used in the four cases cited by The Times. In each of those cases, the Courts of Appeals applied settled law to determine whether, on the facts of the particular case, a new trial was warranted. *See Pappas v. Middle Earth Condominium Ass'n*, 963 F.2d 534, 540 (2d Cir. 1992); *Polansky v. CNA Insur. Co.*, 852 F.2d 626, 628 (1st Cir. 1988); *Allstate Insur. Co. v. James*, 845 F.2d 315, 319-20 (11th Cir. 1988); *Ayoub v. Spencer*, 550 F.2d 164, 170 (3d Cir.), *cert. denied*, 432 U.S. 907 (1977). The Court of Appeals did the same thing in this case.

Moreover, the conduct in each of the four cases upon which The Times relies was decidedly improper; nothing similar happened in this case. For example, in *Polansky*, *supra*, counsel repeatedly argued his own personal opinions and the issue of insurance. In *Pappas*, *supra*, the closing argument was intended to inflame the Vermont jury against "outsiders" from New Jersey.

[7] Ms. Stacey Chodash, who worked for Donald Garlock in late 1988 and early 1989, testified at trial. Ms. Chodash was hired as a "graphic artist," the same position Ms. Berman held. Mr. Garlock told Ms. Chodash that "he believed that the woman's place was at

rector of human resources, when Ms. Berman complained to her of discrimination on multiple occasions in 1991,[8]

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home raising children," and referred to women as "bitches." "[H]e said to me . . . he believed women, it was their duty to stay home, it was not their place to be in the work force, they didn't belong there." Ms. Chodash encountered the same types of abuse to which Ms. Berman testified. Mr. Garlock "would just look at me and he would say, 'um-um-um, you look good today.' " "He just stared. He wouldn't stop. It wasn't like a casual look at me. It wasn't a glance." On "several occasions" Mr. Garlock placed his hand on Ms. Chodash's knee and thigh, making her uncomfortable and forcing her to leave the room. Ms. Chodash was given "work for a graphic artist to do" only "[v]ery infrequently," and that work "was simple paste-up." Mr. Garlock's male subordinate "was doing all the graphic work for the department."

Ms. Chodash decided, after five months of this abuse, to resign. Ms. Chodash arranged a formal exit interview. Immediately before the exit interview she encountered another Times employee (the son of the CEO of The Times) who asked Ms. Chodash why she was leaving. "I told him because Don Garlock had been sexually harassing me." "He said, 'Stacey, I would not say that at your exit interview.' " Ms. Chodash did, however, tell the truth at her exit interview. "I told her about my experiences at The Times from the very day I started up till that date." Ms. Chodash told The Times personnel department "everything that [she] told this jury today." Liz Sommers from The Times' personnel department "wrote everything down." These notes were not produced in discovery, and were not intorduced into evidence by The Times.

[8] Ms. Berman complained to Tracy Hoff of The Times' human resources department at least four times about the abusive conduct of Mr. Garlock. Ms. Hoff, by her own admission, took no action—and lied to Ms. Berman by telling her that there had never been a problem with Mr. Garlock before. Ms. Hoff herself had "investigated" Ms. Chodash's complaint against Mr. Garlock, concluding that Ms. Chodash had lied without ever speaking to her.

After testifying for The Times on direct examination, in great detail, as to each of several meetings with Ms. Berman in 1991 and 1992, Ms. Hoff admitted to her deposition testimony that she could not even remember how many times she met with Ms. Berman in 1991, much less what was said at any one of the meetings. Ms. Hoff was also thoroughly impeached by her "settlement" with The Times: a $28,000 payment made between the first and second sessions of her deposition, in exchange for her promise to testify,

and (iii) documents underlying summary charts generated by The Times during the course of the litigation, purporting to show Ms. Berman's job assignments.[9]

The Times objected to some, but not all, of these references during Ms. Berman's closing argument and rebuttal.[10] As articulated by The Times' counsel, the basis for objection was that it is "improper . . . to comment on evidence that are [*sic*] absent, on documents that were not introduced. That's improper. It's like commenting on a witness who doesn't testify." [11] In this, The Times was partly correct: commenting on evidence which has not been introduced, in a civil trial, is similar to commenting on a witness within the control of a party who does not appear. However, it is black letter law that both forms

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after which her memory "improved" markedly. The jury would have been justified in disbelieving everything Ms. Hoff testified to on the stand.

[9] Mr. Peter Pitts was Mr. Garlock's supervisor at The Times. Mr. Pitts testified at great length as to the work status reports and summary charts submitted by The Times (and was, indeed, the only defense witness on those exhibits). However, Mr. Pitts testified that he saw the summary charts for the first time on the stand —and yet swore under oath that charts the accurately summarized tens of thousands of entires on the status reports, an inherently incredible statement. Mr. Pitts testified he had no idea who prepared the charts and, in at least one case, had no idea what the chart's "scale" meant.

[10] The same form of argument was made repeatedly by Ms. Berman, without drawing an objection from The Times. Indeed, Ms. Berman's rebuttal closed with the observation, "Now, I would say compare these notes to Stacey Chodash's exit interview but we can't. In the words of my four-year-old, poof, they are gone." The Times chose not to object to this or to more than a dozen other references to missing documents throughout Ms. Berman's closing. Failure to sustain The Times' objections, if it were error, would have been harmless, the same references having been made without objection.

[11] This colloquy between counsel and the Court, omitted from The Times' petition, was before the Court of Appeals as page 288 of the Joint Appendix.

of commentary are proper and appropriate. The issue is even the subject of a standard federal jury instruction:

> If a party fails to produce evidence which is under his control and reasonably available to him and not reasonably available to the adverse party, then [the jury] may infer that the evidence is unfavorable to the party who could have produced it and did not.

3 Devitt, Blackmar & Wolff, *Federal Jury Practice and Instructions, Civil* (4th Ed. 1987) § 72.16 (Failure to Produce Available Evidence).

There is a world of difference from arguing for a result based on material which has not been introduced as evidence (the situation in the cases cited by The Times in its petition), and arguing—as Ms. Berman did here—that the jury should draw an unfavorable inference from the fact The Times had possibly-probative documents which were not introduced.[12] Even where "[t]he record is barren as to what actually happened to [the evidence], . . . it is a permissible inference that if they were truly probative . . . then the [party] would have produced [it]." *Doe v. Johnson*, 52 F.3d 1148, 1161 (7th Cir. 1995).[13]

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[12] The jury heard testimony, for example, that the notes of Ms. Chodash's exit interview were given to "counsel."

[13] This principle is well-settled and not open to serious dispute. *See, e.g., McCrary-El v. Shaw*, 992 F.2d 802, 812-13 (8th Cir. 1993) (error to require proof that documents were destroyed since party is "entitled to argue to the jury that [the opposing party] still had the [evidence] and was refusing to produce it because it was damaging to its case"); *Niehus v. Liberio*, 973 F.2d 526, 530 (7th Cir. 1992) (Posner, J.) (it "should be enough that the party could have produced the evidence and that he surely would have done so had the evidence been favorable to him"); *United States v. St. Michael's Credit Union*, 880 F.2d 579, 597 (1st Cir. 1989) ("the failure of a party to produce available evidence that may help decide an issue may justify an inference that the evidence would be unfavorable to the party to whom it is available or whom it would ordinarily be expected to favor"), *quoting* 2 C. Wright, *Federal Practice & Procedure* § 489 (1982); *Kowalchuk v. United States*, 176 F.2d 878, 877 (6th Cir. 1949) (noting "the general rule is that

In sum, Senior Judge Bryant was correct when he told The Times' counsel during this colloquy that the documents referred to "don't have to be put in evidence," and the Court of Appeals was correct when it affirmed the trial court's denial of The Times' post-trial motions on this ground.

Even if the law were otherwise as to the particular examples of argument on which The Times relies, both the trial judge and the unanimous panel of the Court of Appeals properly determined that prompt curative instructions obviated the need for a new trial.[14] Immediately after Ms. Berman concluded her rebuttal, Senior Judge Bryant began the charge to the jury. Mere moments after the comment in rebuttal respecting Mr. Martin's investigatory style [15] (*i.e.*, less than two pages of transcript later) Senior Judge Bryant instructed the jury:

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failure to produce available evidence which would help decide the issue raises the inference that such evidence would be unfavorable to that party if produced").

[14] This case is nothing at all like *New York Central R.R. Co. v. Johnson*, 279 U.S. 310, 49 S.Ct. 300, 73 L.Ed. 706 (1929), the sole authority from this Court upon which The Times relies—although, tellingly, a case which was neither discussed nor even cited by The Times in any of its three briefs to the Court of Appeals. The issue of curative instructions was not even raised in *Johnson*, where this Court faulted the "failure of the trial judge . . . to make certain that the jury would disregard" improper argument. 279 U.S. at 318, 49 S.Ct. at 303.

[15] John Martin, corporate counsel of The Times, was one person charged by The Times with addressing Ms. Berman's charge of discrimination. Mr. Martin called Ms. Berman into his office after receiving the charge from the EEOC, but did not ask Ms. Berman for any of the specifics of her complaint. Mr. Martin also testified that he did not interview Ms. Berman with respect to her claims of abusive treatment or unfavorable work assignments, and did not interview any of the women who were supervised by Don Garlock. Mr. Martin testified that Mr. Garlock's "crybabies will be shot on sight" sign was not "offensive." In responding to the EEOC request for information, Mr. Martin testified that he did not produce a copy of Ms. Chodash's exit interview and did not produce a copy of

> You are the sole and exclusive judges of the facts. You alone determine the weight, the effect, and the value of the evidence and the credibility of the witnesses. You should determine the facts without prejudice, without fear or favor, solely from a fair consideration of the evidence in the case. . . . You are the sole and exclusive judges of the facts.

Senior Judge Bryant then continued:

> The actions of the Court during the trial in ruling on motions or objections by counsel or in comments to counsel or in questions to witnesses or in setting forth the law in these instructions are not to be taken by you as any indication of the Court's opinion as to how you, the jury, should determine the issues of fact. If as a matter of fact the Court has expressed or intimated in any fashion any opinion as to the facts you are not bound by that opinion because what the verdict shall be in this case is your sole and exclusive duty and responsibility.
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> * * * *
>
> You must weigh and consider this case without regard to sympathy, prejudice, passion for or against any party in the case.
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> * * * *
>
> [Y]ou may consider only the evidence properly admitted in the case[. E]vidence includes the sworn testimony of witnesses, the exhibits which have been admitted into evidence in the course of the trial, and the facts stipulated to by counsel.
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> * * * *

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the notes taken by Ms. Hoff in her January and March 1991 meetings with Ms. Berman. All in all, counsel's argument that Mr. Martin performed an inappropriate investigation was precisely what the district court found it to be: "nothing more than passionate advocacy." App. at 24. This rhetorical flourish was hardly what The Times calls it, "an accusation of grossly immoral conduct." Petition at 10.

> I should reiterate and re-emphasize what isn't evidence. The statements of counsel are not evidence and should not be considered as evidence . . . . I told you at the outset of the trial that . . . after all the evidence was in you would be exposed to the closing arguments and closing statements of counsel and at that time I believe I told you or cautioned you that those statements were not evidence.[16]
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> * * * *
>
> At the close of the case counsel are allowed to make a closing argument. . . . [T]he statements of counsel do not constitute evidence in themself.
>
> * * * *
>
> Evidence was presented primarily through witnesses who take the witness stand and testify. You as jurors must consider and weigh the testimony of all the witnesses who have appeared before you.

It is well-settled that the jury is presumed to have followed these instructions. *Richardson v. Marsh*, 481 U.S. 200, 211, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987). These "prompt instructions obviated any prejudice," even assuming any improper remark had been made.[17]

Finally, in the context of a trial which extended, with some interruption, from the first week in February through the first week in March 1995, the brief remarks isolated by The Times are insubstantial.[18] Even if the argument

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[16] At the beginning of trial, immediately after the jury had been selected, Senior Judge Bryant instructed the jury, "In the first place, I want to caution you that remarks of counsel, either opening statements or their closing remarks, are not evidence. Evidence comes from the witness stand."

[17] *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343 (4th Cir. 1995) (comments respecting supervisor having a sexually transmitted disease; any prejudice obviated by general curative instructions). *See Mosser v. Fruehauf Corp.*, 940 F.2d 77, 82 (4th Cir. 1991) (curative instructions obviate any possibility of prejudice).

[18] The transcript of plaintiff's closing argument itself is about forty pages long; The Times' closing argument consumed more than forty pages of transcript.

had been improper, and even if no curative instruction at all had been given, the trial judge and the Court of Appeals each correctly determined that "these statements clearly did not so permeate the closing argument or the Plaintiff's presentation during the three weeks of trial that they could have prejudiced the jury or affected the verdict." [19]

II. THE COURT OF APPEALS PROPERLY DECIDED AS A MATTER OF LOCAL LAW, THAT THE TIMES WAS NOT ENTITLED TO A NEW TRIAL UNDER A STANDARD OF PROOF WHICH THE TIMES DID NOT PROPOSE AT TRIAL

The Court of Appeals properly rejected The Times' assertion, raised for the first time on appeal, that part (but not all) of Ms. Berman's claim for punitive damages should have been decided under a "clear and convincing evidence" standard.[20] Since The Times did not request that the jury be instructed on this standard, and

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[19] August 17, 1995 Memorandum Opinion of Senior Judge Bryant, App. at 25. *See* App. at 10, July 22, 1996 Memorandum Opinion of Court of Appeals ("in consideration of the record as a whole," no abuse of discretion in denying motion for new trial based on closing argument). *See generally Smith v. National R.R. Passenger Corp.*, 856 F.2d 467, 472 (2d Cir. 1988) (two paragraphs of objectionable material in over fifty pages of argument does not warrant reversal). *See also Cooper v. Firestone Tire & Rubber Co.*, 945 F.2d 1103, 1107 (9th Cir. 1991); *Valbert v. Pass*, 866 F.2d 237, 242 (7th Cir. 1989).

[20] This argument relates solely to the recovery of punitive damages in excess of $300,000. Punitive damages of up to $300,000 are recoverable under Title VII of the Civil Rights Act, as amended in 1991, 42 U.S.C. § 1981a, and there is no claim that a "clear and convincing evidence" standard applies to that recovery. In addition, since the District of Columbia courts have uniformly held that the D.C. Human Rights Act, D.C. Code §§ 1-2501 *et seq.*, should be construed in conformity with Title VII, it is not at all clear that the District of Columbia courts would require "clear and convincing evidence" for the recovery of punitive damages under that statute. This is a thicket of local law which this Court need not, and should not, enter.

since The Times did not object to the use of a "preponderance of the evidence" standard in actually instructing the jury, Fed. R. Civ. P. 51 provides a complete and commonplace answer to The Times' petition: "No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds for the objection." There is no question but that The Times failed to comply with Rule 51, and did not even raise this issue in the trial court on post-trial motions.[21]

Moreover, The Times' failure to request a "clear and convincing evidence" instruction is not explicable on the grounds that it was surprised by a subsequent change in the law of the District of Columbia. As early as 1991, this Court signaled that there is "much to be said in favor of" a clear and convincing evidence standard for punitive damages, noting that many states already required such.[22] Maryland, generally the source of the common law of the District of Columbia, adopted a clear and convincing evidence standard of proof for punitive damage awards in 1992.[23] Even the D.C. Court of Appeals signaled that it might require clear and convincing evidence for punitive damage awards, some four months before the trial judge in this case decided The Times'

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[21] Again, The Times seeks to manufacture a "split" among the circuits by pointing to other courts which have decided analogous, but not identical, issues in a different way. What The Times' petition ignores, however, is that in this case the issue of retroactivity is one of *local District of Columbia law*. It is entirely permissible for different federal Circuits to apply the differing laws of the differing states and jurisdictions to reach different results. These questions of local law are particularly ill-suited for resolution by writ of certiorari.

[22] *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 23 n.11, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991).

[23] *Owens-Illinois Corp. v. Zenobia*, 315 Md. 420, 601 A.2d 633 (1992).

post-trial motions.[24] There is nothing unforeseeable about this change in the law; if The Times wanted the jury instructed on a clear and convincing evidence standard in this case, its failure to request that instruction is inexplicable and dispositive.

In sum, as the Court of Appeals correctly noted in Ms. Berman's case, the issue of whether punitive damages under District of Columbia law must be proved by clear and convincing evidence "was still open and undecided at the time of the trial in this case; therefore, the supervening authority doctrine does not apply." App. at 9. This determination is entirely consistent with the manner in which the local District of Columbia courts have handled the issue. In *Dyer v. Bergman & Associates*, 657 A.2d 1132 (D.C. 1995), the D.C. Court of Appeals noted that the standard of proof for punitive damages was still unresolved, yet declined to resolve the issue because the defendant in that case, like The Times here, had not requested use of a "clear and convincing evidence" standard at trial.

The issue under local District of Columbia law of the retroactive application of the change in the burden of proof for punitive damages is fairly clear. Nothing in the case which announced the principle, *Jonathan Woodner Co. v. Breeden*, 665 A.2d 929 (D.C. 1995), suggests in the slightest that the new standard of proof should be applied retroactively, much less to cases pending on appeal at the time of the *Breeden* decision. Under District of Columbia law, several "specific criteria" are used to determine the application of a new rule of law to pending cases: (i) the extent of reliance on the old rule and the hardship to litigants if the new rule were to be applied; (ii) avoidance of altering vested property rights;

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[24] *Dyer v. Bergman & Associates*, 657 A.2d 1132 (D.C. 1995). *Dyer* was argued to the D.C. Court of Appeals some six months before the jury in Ms. Berman's case was instructed.

(iii) the desire to award plaintiffs who seek to "initiate just changes in the law"; and (iv) the "fear of burdening the administration of justice by disturbing decisions reached" under earlier precedent. *Mendes v. Johnson*, 389 A.2d 781, 789 (D.C. 1978). In this case, each of these four factors counsels against disturbing the settled verdict in favor of Mr. Berman; in particular, the burden on the judicial system "has assumed great importance," and under District of Columbia law "[c]ourts are acutely aware of the potential impact on the judicial system that retrospective application of such decisions, *requiring relitigation of cases already decided* under prior rules, would have and, consequently, have been reluctant to disturb settled cases." *Mendes, supra*, 389 A.2d at 791 (emphasis added).

The new iteration of the evidentiary burden of a plaintiff under D.C. law can have no application to this case. The question of whether the local courts of the District of Columbia will determine that heightened burden to apply retroactively, or in cases of this sort, is not one which should occupy the time of this Court.[25]

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[25] This Court has refused repeatedly to apply new rules retroactively in civil cases. *See generally Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971); *American Trucking Assns. Inc. v. Smith*, 496 U.S. 167, 188-200, 110 S.Ct. 2323, 110 L.Ed.2d 148 (1990) (O'Connor, J., concurring).

CONCLUSION

For all of the foregoing reasons, the petition should be denied.

Respectfully submitted,

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